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A SOCIAL CHARTER FOR CANADA?

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A SOCIAL CHARTER FOR CANADA?

The concept of a social charter is new to Canadian political and constitutional discourse. At present, the driving force behind the idea of such a charter for Canada is the Ontario government, which released a discussion paper and two background papers on the issue in September 1991. This paper will outline the rationale behind a social charter as envisaged by Ontario and summarize that government's suggestions as to how such a charter might be implemented. The paper will then discuss the possible implications of a social charter, and situate the debate within the context of the wider constitutional discussions.

WHAT IS A SOCIAL CHARTER AND WHY IS IT BEING PROPOSED?

In general terms, a social charter would be a statement, incorporated into the Constitution, of Canada's commitment to certain values and principles protecting the social and economic welfare of its citizens. Such a charter would involve institutions with the mandate to oversee the development and application of the principles. Two other elements are also crucial: the necessity of broad public participation in the design of social programs and a recognition of the importance of "national sharing," by which is meant continued equalization payments.

Since its patriation in 1982, the Constitution, particularly the *Canadian Charter of Rights and Freedoms,* has become Canada's most important legal document - certainly the one on which public attention is the most focused - and it continues to evolve in this direction. Thus, the symbolic stature of any principles it included would be enhanced. Just as the Constitution stands above the ordinary law, the principles of a social

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charter would stand above other statements of principles or rights not so entrenched.

In addition, as a practical matter, because of the special requirements for constitutional amendment, any principles entrenched in the Constitution would be far more secure than any similar legislative statements (for example, the goals stated in the preamble to the *Canada Assistance Plan),* and immeasurably more secure than the pronouncements of principle or intentions of governments or politicians. Whether or not the principles of a social charter would be enforceable is another matter and will be dealt with below.

Ontario's discussion paper(1) asserts three main purposes for a social charter:

1. To reflect the current view of who we are as a people and what it means to be Canadian. The past is characterized as being a time when unity was forged by physical ties such as the railways; now, we take our shared sense of Canada from our values and our network of social programs: health care, education, unemployment insurance and social welfare services, to name the most obvious. Canadians take pride in these social programs. They have come to be seen as fundamental to the country and enjoy widespread support. For this purpose, the charter would fulfil its goal by its symbolic nature alone.

2. To protect the implicit social contract that has grown up between governments and the Canadian people in the post-World War II period. This goal implies that the charter would have to have more than merely symbolic value, that some mechanism would have to exist to defend the programs that implemented the values and principles of the charter when they were under attack.

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(1) *A Canadian Social Charter: Making Our Shared Values Stronger,* A Discussion Paper, Minister of Intergovernmental Affairs, Toronto, Ontario, September 1991.

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3. To indicate the challenges that remain to Canada in the area of social policy so that economic and social dignity may be achieved. The discussion paper notes the fact that there have been no significant new social programs for a number of years, yet numerous social problems persist.

In his speeches, Premier Bob Rae has objected to the prospect of extensive decentralization of power on the ground that such a measure would leave out "the soul of Canada." In summary, a social charter would provide a way to express, retain and enhance the essence of the country.

The avowed purposes of a social charter are one thing. The motive for pursuing a social charter at this time is another. In this regard, the government of Ontario is clear:

> Entrenchment is not merely a formal recognition of a part of what defines and holds us together as Canadians. It is also a strategy for ensuring that growing interprovincial and international economic competitive pressures do not become an excuse for weakening our social contract. ... The social charter will ensure that the social policy infrastructure cannot be destroyed for reasons of short-sighted political expedience or misguided economic theory.(2)

Lest there be any doubt that the theory and principles of a social charter cannot be divorced from recent and current political and economic pressures, Ontario is later even more explicit:

> Another concern is to ensure that the federal government continue to help finance national social programs. For some years now, the federal government has been cutting back its contribution to Established Program Financing (EPF), the program which provides funding to provinces to help pay the costs of health and post-secondary education. It is estimated that in less than ten years, the federal government will no longer be sharing the costs of these programs. Since health costs have been rising sharply, and since the national system depends on federal enforcement, this

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(2) *Ibid.*, p. 3.

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> raises concerns about our ability to protect one of the cornerstones of our social contract.
>
> Equally serious is the federal government's decision not to respect its commitment under the Canada Assistance Plan (CAP) to share 50% of the cost of providing social assistance and social services in the three provinces which do not receive equalization payments. This decision violates the principles of equity and fairness, and raises doubts about the federal government's commitment to its role in maintaining the national social network.(3)

ELEMENTS OF A SOCIAL CHARTER

A. Values and Principles

The Ontario Discussion Paper draws the oft-noted distinction between positive and negative principles. The latter, typically concerned with political and civil rights, set limits on what governments may not do: they may not deprive individuals of life, liberty and security of the person except in accordance with the principles of fundamental justice; they may not interfere with an individual's freedom of expression; they may not subject an individual to unreasonable search and seizure, and so on. Negative rights may be asserted in the courts, and have been routinely in Canada since the advent of the Charter.

Positive principles, on the other hand, express broad social policy goals and the obligation of governments to work toward these goals by political means - legislation, funding, and so on.(4) The degree to which governments can implement the goals depends on available resources. They are inherently political, and the "rights" that may be said to derive from them are usually too general to be justiciable (that is, subject to adjudication and enforcement by the courts) in the traditional sense.

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(3) *Ibid.*, p. 12-13.

(4) Not all "positive" rights are tied to social policy goals; for example, the right to vote and language rights require the government to facilitate rather than just not to obstruct, their exercise.

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Despite this distinction, Ontario notes that some social policy standards are capable of being expressed as negative, enforceable rights; the right to portability or universality are given as examples. It is noteworthy that Ontario does not use the word "right" to describe the obligations that flow from positive principles (see further discussion on p. 11).

Principles could be expressed in the Constitution in a number of ways. Very general principles would exhort governments to protect and promote equal access to (using Ontario's examples) adequate health care, education, housing, income security, a clean and safe environment, and the basic necessities of life. This type of clause could stand on its own or become part of the existing section 36 of the *Constitution Act, 1982* (discussed below).

Another approach would be to entrench certain aspects of social programs on which there is a clear consensus - for example, the principles that there should be universal access to health care and to primary and secondary education. Alternatively, the goals and norms applicable to various programs could be entrenched, in the same way as certain principles are included in the *Canada Health Act*.

B. Institutions

Ontario recognizes the potential difficulties of court "enforcement" of the kind of positive rights that would be contained in a social charter:

> To be consistent with the requirements of our democratic tradition, general principles should not transfer the obligation to develop and implement social policy from governments to the courts. After all, social policies almost always have significant financial implications, and should, therefore, be ultimately subject to control by the voters. For example, the broad objective of the Canada Assistance Plan (CAP) -- "the prevention and removal of the causes of poverty" -- is clearly too general to be enforced by the courts.(5)

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(5) Ontario discussion paper, p. 16.

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Ontario proposes four essential characteristics for the institutions responsible for implementation of the charter: they should provide for intergovernmental cooperation, so that responsibility for the implementation of the social principles would remain part of the political process; they should be "predictable," that is, commitments between governments could not be unilaterally changed, or at least not as easily as is now possible following the decision of the Supreme Court of Canada; they should be open to public input; they should be flexible enough for innovation to be possible without being constrained by "rigid requirements for consensus."

Three options for appropriate institutions are presented:

> A new body, to replace the Senate, with significant representation by provincial governments. In addition to serving as a mechanism for intergovernmental cooperation, the body would review federal legislation, or both federal and provincial legislation, and monitor implementation of the principles on an ongoing basis.
>
> A reformed Senate, to review provincial and federal legislation relating to the social charter (with possibly a suspensive veto), monitor progress, and provide a public forum for discussion of basic principles.
>
> A reference in the Constitution to an institution to be required to be established by the federal and provincial governments.

DOES CANADA ALREADY HAVE A SOCIAL CHARTER?

Section 36 of the *Constitution Act, 1982* states:

> 36.(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
> (a) promoting equal opportunities for the well-being of Canadians;
> (b) furthering economic development to reduce disparity in opportunities; and
> (c) providing essential public services of reasonable quality to all Canadians.

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> (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

This section entrenches two principles relevant to the contents of a social charter: the well-being of Canadians as a goal of both levels of governments and the principle of equalization as one method of achieving it.

Premier Clyde Wells of Newfoundland is reported to have said that in section 36 Canada already has a rudimentary social charter, and "it just needs some teeth."(6) The Ontario discussion paper comments as follows on the section, implying, as did Premier Wells, that the symbolic value of the section was insufficient on its own:

> However, it is generally recognized that these principles are neither specific nor comprehensive enough to ensure that the actions of governments in Canada continue to uphold and strengthen national standards of social programs across the country. A broad set of well-defined principles would make a positive contribution to placing an obligation on all Canadian governments to respect and abide by the social contract.(7)

A research report prepared for Ontario by the Institute of Intergovernmental Relations also downplays the practical relevance of section 36, but with a slightly more cautious tone:

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(6) *The Globe and Mail* (Toronto), 10 September 1991.

(7) Ontario discussion paper, p. 15. It might be commented that it would be hard to find a more comprehensive term than the "well-being" of Canadians. Moreover, the words "well-defined principles" appear to be a contradiction in terms. Principles are by their very nature general; to define them would require extensive amplification in the document itself -- an approach generally unsuitable for a constitution -- or numerous court decisions, or a combination of both.

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> A crucial aspect of a "social charter" is the extent to which particular provisions are justiciable. Section 36 of the Canadian Constitution is generally considered by constitutional scholars to be non-justiciable due to the vague and political nature of its drafting. In any case, it has never been tested in the courts so it remains unclear whether its provisions have any legal force.(8)

A SOCIAL CHARTER AND THE FEDERAL GOVERNMENT

It is clear throughout the documents issued by the Ontario government that the idea of a social charter is linked closely to the maintenance of a federal role in social programs. The most important reason presented for this is the federal government's financial leadership role to date in the initiation and continuation of social programs. Clearly, the province views continued federal financial contributions as essential, both for the programs themselves and, by extension, for the operation of a social charter. This is no doubt the case under existing federal-provincial fiscal arrangements; however, there may be no intrinsic reason why this should always be so. If provinces were, through their own taxing power, provided with sufficient and comparable revenue to meet their obligations, citizens could look to their own provincial government for implementation of their social charter entitlements without the involvement of the federal government.

Assuming, on the other hand, that the current fiscal arrangements remain more or less in place, and that, therefore, a federal presence continues to be important, it is not clear that a social charter could "ensure" such presence. As noted above, the federal government's attempt to restrain payments to the three richest provinces under the CAP was recently upheld by the Supreme Court of Canada, which held that the principle of parliamentary sovereignty enabled Parliament unilaterally to change the legislation governing its agreements with the provinces. It is

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(8) *Approaches to National Standards in Federal Systems,* Institute of Intergovernmental Relations, Queen's University, September 1991, p. 40.

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thus difficult to see how Ontario's goal could be achieved without a radical curtailing of the principle that a government cannot bind future governments, unless the Constitution were to state that current program funding could not be changed.

The second reason for continued federal involvement is that the federal government is necessary for the enforcement of national standards. This assertion, however, should be scrutinized carefully. It would appear to rest on only one incident, when the *Canada Health Act* was amended to forbid user fees and to withhold federal transfers of money to provinces not in compliance with the Act. It must be remembered that the federal initiative in that case enjoyed widespread political support in the country; other violations of the principles of the *Canada Health Act* (e.g., obstacles to portability between provinces, hospital emergency user fees) have not been "enforced" and may, indeed, be politically unenforceable. Further, it is significant that some federal transfers, such as those for post-secondary education, are unconditional; in the case of education, there are no national standards to enforce.

Indeed, the term "national standards," although frequently referred to and often held up as something to be preserved or as a goal to be worked toward, should be used very cautiously. In most cases, the term suggests much more than it can deliver, and as long as constitutional jurisdiction over social programs remains with the provinces this will continue to be the case.

As noted, the concept of a social charter as presented by Ontario is linked closely to the maintenance of national standards. These, in turn, are linked to federal government equalization payments. Indeed, Ontario asserts that without "equalization there can be no meaningful national standards."(9) Consequently, it calls for a reaffirmation of the country's commitment to equalization in the social charter.

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(9) Ontario discussion paper, p. 25.

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THE NATURE OF PRINCIPLES

Significant definitional problems arise when contemplating one of the possibilities posited by Ontario, the entrenchment of general norms or standards such as those in the *Canada Health Act*. For example, the five principles of that Act are easy to state -- public administration, comprehensiveness, universality, portability, and accessibility -- but their meaning is by no means self-explanatory. The Act itself contains 18 definitions and there are also important qualifications and explanations to the principles. For example, the criteria relating to portability comprise over 40 lines of text, all dealing with finances. Similarly, the principle of "comprehensiveness" might suggest that services in nursing homes and other types of care must be rendered free of charge. In fact, the prohibition on user fees applies only to "insured services"; "extended health care services," such as are found in nursing homes, home care services and so on, are treatedly differently. Thus, it becomes clear that entrenching general principles in the Constitution would raise numerous questions, yet it would not likely be thought appropriate to enact in a Constitution the kinds of essential details found in ordinary legislation and regulations. (These details would not be necessary, of course, if the principles of a social charter were intended to have symbolic value only.)

Devising principles applicable to a variety of social programs would also pose problems, despite the optimism of the Ontario discussion paper ("Of course ... the standards will have need to be carefully reviewed and re-phrased so that they also apply to other social programs."[10]) On closer inspection it would likely be found that the principles for each program were quite distinct. What does "public administration" mean in the context of an educational system with a mix of private and public schools? Similarly, the principle of "accessibility" in relation to health care, with its relationship to user fees, would carry quite a different meaning in relation to post-secondary education.

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(10) *Ibid.*, p. 18.

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ENFORCEABLE OR MERELY SYMBOLIC?

Would the principles of the social charter be enforceable or would they be symbolic only? If the latter, there is no need to talk about "enforcement," but it might still be possible to talk about monitoring (although a number of organizations in our society already perform that function). The Ontario discussion paper does appear to suggest as one option the provision of very general principles, which would have symbolic and hortatory purposes and would not be enforceable by courts (or, presumably, by any other body with the power to force legislatures to comply). The rest of the discussion paper, however, and Premier Rae's public statements, suggest that some type of enforcement is important and that there must be an institution to perform this function.

Problems of semantics are bound to arise in discussions of the "enforcement" of a social charter. Normal usage of the word suggests that enforcement must entail not only the jurisdiction to decide whether certain norms have been complied with, but also the ability to compel compliance where such has been found lacking. Any proposal that involved only oversight and the recommending of changes by whichever institution might be chosen for the role cannot, therefore, properly be said to be enforcement of the social charter, though of course the oversight role might be beneficial in raising and publicizing issues.

Another semantic question also arises in the context of "enforcement." As noted above, the Ontario proposal does not use the word "rights" when describing the obligations that flow from social charter principles. This is surely deliberate. Rights cannot be divorced from remedies. To speak of rights in a context where the holders of the rights would have no means of asserting them (because enforcement was purely political) would be confusing at best. Thus, the Ontario document speaks of enforcing principles, norms or standards, rather than rights.

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RESPONSIBILITY AND ACCOUNTABILITY

If the principles of a social charter are intended to be enforceable, who would have the final say on what they meant and who would be accountable? On this point, Ontario seems to want to have its cake and eat it too. In the following passage, the province seems to suggest at one and the same time that the country would have:

(1) institutions to develop and implement social programs, review the actions of government and enforce the social charter;

(2) governments which would continue to have the kind of role they have today; and, in addition,

(3) a role for the courts:

> Once we agree on a set of principles to be entrenched, we would need to ensure that we have the institutions in place to develop, negotiate, and implement the programs and financing arrangements which arise from these principles, to review and monitor the actions of governments, and enforce their obligations under the charter.
>
> The institutions which should be developed as part of the social charter will operate, of course, within the existing framework whereby governments develop policies, legislate, finance and deliver services, and are subject to scrutiny and ultimate control by the voters. Whenever appropriate, the courts, too, would have a central enforcement role.(11)

As noted above, however, Ontario does not see the courts as the primary enforcement mechanism for the social charter. Two reasons are given for this. First, in our democratic system governments should continue to develop and implement social policy because only governments can be held accountable for the resulting financial implications. Second, such rights are too general for the courts to enforce. These reasons are generally valid, but it should be kept in mind that, although the decisions of courts do not usually carry public finance implications, this is not always the case, particularly recently. One need only think of the impact

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(11) *Ibid.*, p. 19.

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on the Ontario judicial system of the *Askov* decision mandating speedier trials, or some recent decisions in the environmental field. Public costs have even been directly imposed by courts, although the legitimacy of this practice has not yet been decided by the Supreme Court of Canada. It will be remembered that the Federal Court, in finding that there was discrimination against natural fathers under the *Unemployment Insurance Act*, extended benefits to natural fathers as a group, rather than cutting existing benefits to adoptive fathers.

Regarding the general nature of the rights in question, it must be noted that many of the rights in the Charter are also very general ("unreasonable search or seizure," trial within "a reasonable time"); yet the courts interpret their meaning on a daily basis. Related to the potential financial implications is perhaps a more fundamental objection to court interpretation of general rights in the social policy field: the fact that their interpretations could lead in totally unexpected directions. This is illustrated by the short history of the Charter; the scope of some of its jurisprudence has been quite wide, and, more importantly, some of the interpretations have been directly contrary to the intentions of its drafters, even when those intentions were known to the judges. Unless there were the equivalent of a "notwithstanding" clause, such decisions would be very difficult to change. The legislatures' loss of control of both program design and financing could well be enormously significant. Therefore, perhaps the issue is less that courts could not decide on such general rights, but more that many (and particularly politicians) would feel uneasy at giving the judiciary such power.

Court oversight could result in a system whereby a major court battle would ensue every time a province or the federal government tried to change any element of a social program that benefited someone. Currently, these battles are political, and if our current political structures are not sufficiently responsive to the electorate, the answer might be to change them rather than transfer control to the courts, which do not have to raise taxes to pay for social programs, or manage the deficit if adequate taxes have not been imposed.

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Nor do the courts have any mechanism for establishing priorities among competing social programs, each of which, considered separately, might be very worthwhile. Governments have access to detailed information that helps them to set priorities among program components. If courts were to judge each case separately on its merits, how could social entitlements be fairly and rationally apportioned, particularly in a time of retrenchment? Yet, in the absence of infinite resources, these decisions must be made; at present, they are made by governments elected by and accountable to the people.

In addition, if courts were to adjudicate these issues, there could be uncertainty for relatively long periods as lower courts interpreted the social charter. For example, what would happen if a lower court in a province decided that the right to adequate medical care required full payment for nursing care wherever delivered, or that prescription eye glasses were essential for well-being and should be considered an insurable service and fully paid for.(12) There would be considerable confusion until final court decisions were made on these and perhaps a myriad of other challenges.

It should be noted that courts themselves (at least at the higher levels) currently show considerable deference to the legislatures' decisions on social and economic issues.(13) This general approach, however, provides less guidance in individual cases, and in any event, would be influenced by any change in the Constitution expressly including such rights. One need only compare the judicial attitudes of the courts to the *Canadian Bill of Rights* and to the Charter, only 20 years later, to realize that courts can and do change.

However, courts, or quasi-judicial bodies like administrative tribunals, have an inherent advantage lacking in the political

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(12) These examples may seem farfetched, but only because we are conditioned to view things a certain way. The one thing that nine years of Charter interpretation should have taught us is that the old ways of looking at things all come under a bright spotlight when rights are entrenched.

(13) The decision by the Supreme Court of Canada upholding the validity of mandatory retirement is one example of this.

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oversight bodies suggested by Ontario. They are impartial, or above the fray. Although administrative necessity and financial costs no doubt form part of the backdrop to many of their decisions, judges are independent of the political process that advances those arguments and they gain credibility and stature from this independence. There are a number of situations where courts have been expressly excluded from a primary enforcement role (in favour of, for example, labour boards and human rights commissions), but all of the replacement bodies have been independent of government, even if to a lesser extent than courts.

In contrast, institutions such as a new body with representation by provincial governments, a reformed Senate, or any other mechanism to be established by governments -- the three suggestions put forward by Ontario -- while having the advantage of keeping these social policy decisions in the political arena, would not have the independence of the traditional adjudicative bodies. How would a political institution make its decisions on whether the social charter was being implemented "correctly"? How would its deliberations differ from the political arguments advanced in the House of Commons and the legislatures? How could differences be reconciled among provincial representatives of various political outlooks, or between provinces and the federal government? Would the citizen advancing claims based on social charter obligations feel that the decision had been "fair," that it had been based on something other than a political tug of wills? In short, Ontario's proposal that politicians would judge whether other politicians were dealing fairly with the public's expectations for social programs sounds very much like the current system, only more so.

A further point may be made about the expectations of citizens in the face of any social charter principles or obligations that might be constitutionalized. Much would, of course, depend on how such matters were presented, but it can be predicted that people's expectations would be raised by such a step. If the enforcement mechanism remained fundamentally political, might it not engender some degree of frustration, even cynicism, on the part of Canadians? The public input advocated by Ontario is all very well, but constitutional rights in the era of the

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Charter empower people; constitutional rights in a social charter that directly related to people's well-being but that empowered only politicians (even in a new or redesigned political arena) might lead to dissension rather than achieving the desired goals of expressing Canadians' shared values and aspirations and buttressing national unity.

THE SOCIAL CHARTER AND THE CURRENT CONSTITUTIONAL DEBATE

A. Provincial Jurisdiction

The options for institutions that might take on an enforcement role under the social charter suggested, somewhat tentatively, that such institutions might scrutinize provincial legislation for this purpose. However, the Province of Quebec would be likely to find unacceptable any mechanism implying or requiring participation in the design or implementation of Quebec social programs by any person or body other than the provincial government. The same might be true of other provinces. Yet this role would seem to be implicit in each of the models for enforcement institutions. Indeed, it seems inevitable, given that the constitutional jurisdiction over details of the social programs themselves resides with the provinces, and that the federal role typically arises from its use of the spending power and the limited legislative scope that accompanies the exercise of that power.

As discussed previously, the concept of the social charter as presented by Ontario places central importance upon the role of the federal government, both in maintaining existing social programs and initiating (and funding) new ones. This assumes that the federal use of the spending power will continue unchanged. The current constitutional proposals, however, call for approval of at least seven provinces representing 50% of the population before the federal government could introduce new Canada-wide shared-cost programs and conditional transfers in areas of exclusive provincial jurisdiction. Those provinces not participating would receive reasonable compensation if they established their own programs which met the same objectives. Would the provinces that opted out of those programs still be subject to the same scrutiny as the other

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provinces by the enforcement institution, or might they be subject to a different degree of scrutiny, or to none at all?

B. The Emphasis on Economic Efficiency

The federal government proposals for constitutional reform emphasize the importance of developing a stronger economic union within Canada, with a new head of federal power to make laws for its efficient functioning. (Such laws would require the approval of at least seven of the provinces representing 50% of the population.) Ontario's discussion paper exhibits both a desire to encompass the rationale for a social charter within this economic thrust and a suspicion that social values are threatened by the emphasis on economics. The link to economic efficiency is made by asserting that:

> Differing standards for health care or social assistance can act as a barrier to interprovincial mobility. By increasing labour mobility and strengthening the economic union, productivity growth and international competitiveness are also strengthened.
>
> National standards and the network of social programs which they support are important contributors to future prosperity and our collective capacity to respond to the challenges of economic restructuring in the 1990s.(14)

At the same time, Ontario is apprehensive in the face of extensive economic restructuring:

> Entrenchment is not merely a formal recognition of a part of what defines and holds us together as Canadians. It is also a strategy for ensuring that growing interprovincial and international economic competitive pressures do not become an excuse for weakening the social contract. ... The social charter will ensure that the social policy infrastructure cannot be destroyed for reasons of short-sighted political expedience or misguided economic theory.(15)

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(14) Ontario's discussion paper, p. 7-8.

(15) *Ibid.*, p. 3.

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C. Property Rights

Various commentators have noted that the proposal to entrench property rights in the Constitution stands at the opposite end of the political spectrum from the proposal for entrenchment of a social charter. In very general terms, entrenched property rights are seen as most benefiting those in society who "have," whereas a social charter is seen as most benefiting those who "have not," or, at least, those most defenceless in the face of cutbacks to social programs. It has even been suggested that property rights were included in the proposal to be used in bargaining over a social charter. Interestingly, some have suggested that if "property" were not defined, its meaning could include what is sometimes called "new property," that is, entitlements to social benefits. Thus, the two concepts -- a right to property and a social charter -- may not be as disparate as first appears.

In any event, the two concepts share one fundamental characteristic -- both are potentially extremely broad. Without explicit definition, and assuming that the social charter contained some mechanism for enforcement, the two concepts also share the potential to radically challenge the nature of private rights (in the case of property) or the existing system of political accountability (in the case of the social charter).

THE INTERNATIONAL CONTEXT

A companion document to Ontario's discussion paper on the social charter surveys national constitutions and international treaties and concludes that the kinds of economic and social rights proposed for a Canadian social charter have been protected in over one-half of the countries of the world.(16) The purpose of the study was to illustrate that "the entrenchment of social and economic rights or principles in a constitution is not by any means a novel idea."(17)

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(16) Constitutional Law and Policy Division, *The Protection of Social and Economic Rights: A Comparative Study*, Ministry of the Attorney General, 19 September 1991.

(17) *Ibid.*, p. 45.

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The appendices of the report provide examples of social charter rights or principles found in OECD-member state constitutions. They are listed both by country and by subject matter. Some create specific, enforceable obligations on governments (Ireland: "The State shall provide for free primary education"), while most are general expressions of outcomes towards which governments should strive (Germany: "Every mother shall be entitled to the protection and care of the community"; The Netherlands: "The authorities shall take steps to promote the health of the population.")

Some constitutions, such as that of Ireland, expressly provide that most of the social and economic rights are not justiciable; Spain specifies that some of the rights are justiciable, while others are intended as guides to the legislature, judicial procedure and the public authorities. A number of the rights listed in the appendices that would appear to be justiciable deal with the right to free education. Interesting as the appendices are, the study makes no attempt to ascertain the extent to which the rights in the national constitutions have been realized. Where constitutions express general rights or obligations on governments, they expressly leave the details of implementation to the legislatures, or the courts do so by deferring to legislative decisions.(18)

It is very relevant to the present discussion that "very few of the national constitutions surveyed for this study contain provisions that state how social and economic guarantees are to be enforced."(19) With the possible exception of Portugal, which has an Ombudsman and a Constitutional Court empowered to "judge and verify" whether the state has

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(18) *Ibid.*, p. 15-16. Even courts that normally show deference to legislatures in such matters will intervene in extreme cases. The Montana Supreme Court struck down a law which denied welfare to needy, able-bodied, childless people for more than two months in a year. The Montana Constitution states: "The legislature shall provide such economic assistance ... as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune may have need for the aid of society."

(19) *The Protection of Social and Economic Rights* (1991), p. 17.

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lived up to the obligations in the Constitution,(20) no countries appear to have established the kind of political monitoring/enforcement body proposed by Ontario. The latter's models are, therefore, drawn from the implementation mechanisms of regional and international treaties.

In particular, the European Social Charter, a document adopted in 1961, is put forward as a possible model. The detailed social and economic rights in the document are interpreted by independent experts and government representatives. The decision to make recommendations is ultimately made by the Committee of Ministers, but the recommendations apparently do not single out states by name and, by implication, no state is obliged to follow the recommendations.

Similarly, though there are many international documents that contain social and economic rights (the *Charter of the United Nations*, the *Universal Declaration of Human Rights*, the *International Covenant on Social, Economic and Cultural Rights)*, "international human rights are generally enforced and implemented by persuasion rather than coercion. The international system lacks the mechanisms to ensure compliance with international norms."(21) Instead, various reviewing bodies, some of which receive complaints, have been established. Despite the fact that these bodies lack the power to force states to change behaviour, the elaboration of the content of rights and the monitoring of state compliance have no doubt increased the profile and importance of the rights in question.

CONCLUSION

It is too soon to say whether the concept of a social charter will find favour in Canada. Ontario's discussion paper was a preliminary document; a more precise proposal is expected at some point in the future. That document, and the discussions flowing from it, will have to address in more concrete terms the issues noted in this paper: the

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(20) *Ibid.*

(21) *Ibid.*, p. 37.

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relationship between courts and legislatures, whether "enforcement" is possible, the role of the provincial and federal governments in social policy, to say nothing about what principles (and in what form) might be chosen for entrenchment. The discussion promises to be lively.

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